

Clinical Risk and Judicial Reasoning

Editorial Comment

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Medical malpractice is a subject which most physicians, at least in the United States, will have to deal with at least once in their career. In this issue of Clinical Orthopaedics and Related Research, several authors present their perspectives on the subject of medical malpractice litigation. Such litigation is a pervasive phenomenon, both in the United States and overseas.

Once a lawsuit is filed, the defendant physician must negotiate an unfamiliar landscape that can appear hostile and adversarial, and in which the familiar rules and standards of the medical profession no longer apply. Information is a key resource in dealing with the unknown; to that end, this symposium presents the foundations of how medical malpractice claims are adjudicated, along with the perspectives of several physician and lawyer authors concerning evolving issues that continue to impact and shape medical malpractice litigation in the United States and overseas. The symposium editors hope the eclectic mix of articles and divergent perspectives presented here provide the reader with an insight to the legal system charged with handling medical malpractice claims.

The opening article in this symposium is an introduction and overview of the medical malpractice system in the United States; specifically, how allegations of medical malpractice are adjudicated by the law. Many unique characteristics make the American judicial system different from those of other countries. Among these is the reliance

on extensive discovery of underlying facts in the litigation by respective counsel, who adopt an adversarial stance on behalf of the represented parties. In contrast to the judicial systems of many other countries, the role of judges in the American system is minimal when compared to the important function of jurors in evaluating the evidence presented and reaching a verdict. Also, importantly, and unlike some other nations, medical malpractice in the United States is litigated under civil liability laws rather than criminal statutes. Practically, this means that remedies are usually limited to monetary damages and related disciplinary sanctions, rather than a jail sentence for the doctor.

There is concern that the number of medical malpractice claims in the United States has grown, thereby creating a serious burden on health care delivery. Reforms have been attempted at the state legislature level, and there have been efforts to legislate reforms at the federal level. Some physicians claim there is a medical liability crisis in the United States, driven in part by fear of disproportionately large jury awards that make obtaining medical malpractice insurance prohibitively expensive, compelling physicians to relocate their practices to other states. The concern among health care professionals is that lay jurors may not be effective in adjudicating medical malpractice litigation; specifically, that jurors untrained in medical science may reach erroneous verdicts. Several studies address these concerns in the symposium; from an examination of the medical malpractice crisis, to a study about the outcomes of malpractice litigation, and an assessment of jury verdicts in medical malpractice court trials.

Related to the subject of jurors in medical malpractice litigation is the role of the expert witness in litigation concerning professional negligence. American law specifies that in cases alleging professional negligence, such as

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medical malpractice, an expert from the profession must educate and inform jurors about the applicable standard of care in the case. In recent years, there have been serious concerns that some self-proclaimed medical experts may be willing to deliver misleading and erroneous testimony during litigation, in return for monetary reward. In response, state medical boards and professional medical associations have instituted guidelines for expert witnesses, and begun monitoring expert testimony delivered by their member physicians. Physicians who deliver false testimony under oath may be subject to serious professional sanctions, and even lawsuits, filed by the party injured by the defective testimony. This emerging area of law is explored in the symposium as well.

The subject of medical malpractice as experienced in specific orthopaedic specialties, such as adult reconstruction and sports medicine, is presented along with strategies to reduce the risk of a negligence claim. Among these strategies are proposals to have patients sign contracts as a defense to medical malpractice; timely apology for adverse events; examination of the relationship between surgeon age and malpractice risk, and institution of an alternative no-fault system to resolve negligence claims. The guest editors hope you find this symposium informative, controversial, and thought-provoking; the subject addressed is a complex one that involves many stakeholders with competing interests, and one that defies any easy answers.